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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 83

LEO LICHTENSTEIN, LIBBIE LICHTENSTEIN and BYRON J. LICHTENSTEIN, individually and trading as Harlich Manufacturing Company and Loomis Manufacturing Company,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Leo Lichtenstein, Libbie Lichtenstein and Byron J. Lichtenstein, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered February 5, 1952. Petition for rehearing denied February 27, 1952. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A., Sec. 347). This case is reported in 194 F(2) 607. (R. 162)

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The first matter present herein, is that this Court in the case of the *Federal Trade Commission* v. *Bunte Brothers,* 312 U. S. 349 held that the intrastate use of chance to distribute merchandise is not within the purview of the Federal Trade Commission Act and not within the jurisdiction of the Commission. This Court, also, held in the case of *Schechter Poultry Corporation* v. *U. S.,* 295 U. S. 495 that the intrastate sales of merchandise are not within the power granted Congress. Contrary to these two decisions by this Court, the The Circuit Court of Appeals in this case held that the intrastate use of a chance device to distribute merchandise is within the purview of said statute and is within the jurisdiction of the Commission. Basing its decision on this erroneous principle of law the court, also, held that the Commission has jurisdiction to issue a cease and desist order against petitioners preventing them from shipping in interstate commerce chance devices which are to be used in the intrastate distribution of merchandise.

The order issued herein as affirmed by the Court is as follows, to wit:

> It is ordered that the respondents (petitioners here) do forthwith cease and desist from:
>
> Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, punch boards, push cards, or other lottery devices, which are to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

The second matter involved is that the decision herein holds also contrary to and in direct conflict with this Court's holding in the *Bunte* Case, *supra,* that it is to

the interest of the public, as provided in the Federal Trade Commission Act, for the Commission to conduct proceedings which have for their purpose the prevention of the use in intrastate commerce of gambling devices in the sale of merchandise to the ultimate consumer.

The third matter involved herein is that the decision herein by the Circuit Court holds that the Commission has jurisdiction to stop the aiding, abetting, inducing, and procuring of a violation of the Federal Trade Commission Act. This the petitioners contend is contrary to the rule of strict construction as announced by this Court in the cases of: *Federal Trade Commission* v. *Bunte Bros., Supra, Federal Trade Commission* v. *Klesner,* 280 U. S. 19, and *Federal Trade Commission* v. *Raladam,* 283 U. S. 643.

The fourth matter involved herein is that the Federal Trade Commission Act (52 Stat. 111., 15 U.S.C.A. Sec. 45.) is unconstitutional.

QUESTIONS PRESENTED.

1.

The decision in this case is contrary to and in direct conflict with this Court's decision in the cases of *Federal Trade Commission* v. *Bunte Bros.,* 312 U. S. 349, and the *Schechter Poultry Corporation* v. *U. S.,* 295 U. S. 495.

2.

The Commission's jurisdiction is limited to the preventing of the "use" of unfair methods of competition in commerce.

Federal Trade Commission v. *Raladam Co.,* 283 U. S. 643.

Federal Trade Commission v. *Klesner*, 280 U. S. 19.

Federal Trade Commission v. *Bunte Bros.*, 312 U. S. 349.

3.

This proceeding is not to the interest of the public as required by Sec. 5 of the Federal Trade Commission Act.

Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643.

4.

The Federal Trade Commission Act, 52 Stat. 111, 15 U.S.C.A. Sec. 45, is unconstitutional.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.

The Ninth Circuit in this case decided a federal question in a way probably in conflict with applicable decisions of this Court.

The decision in this case is contrary to and in direct conflict with the decisions of this Court in the cases of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, *and Schechter Poultry Corporation* v. *U. S.*, 295 U. S. 495.

2.

The decision herein is in conflict with the decisions of other Circuit Court of Appeals on the same matter.

Federal Trade Commission v. *Mid West Mills*, (C. C. A. 7), 90 F. (2) 723, 724.

California Rice Industry v. *Federal Trade Commission*, 102 F. (2d) 716.

Winslow v. *Federal Trade Commission* (C.C.A. 4th), 277 Fed. 206.

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Canfield Oil Co. v. *Federal Trade Commission* (C.C.A. 6th), 274 Fed. 571, 575.

All of the above cases hold that intrastate transactions are not within the purview of the Federal Trade Commission Act, therefore, are not within the jurisdiction of the Commission. The case at bar holds to the contrary.

3.

The decision herein has decided important questions of Federal Law which have not been, but should be, settled by this Court:

1. That the word *"using"* as used in the Federal Trade Commission Act can be construed to include "contributing to".

2. That a proceeding by the Commission to eliminate the intrastate use of a chance device to distribute merchandise is to the interest of the public as provided for in Sec. 5 of the Federal Trade Commission Act.

It is respectfully submitted that a writ of certiorari should issue in this matter.

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Of Counsel:
George E. Lindelof, Jr.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This case comes before the Court on a petition for certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit wherein an order to cease and desist issued by the Federal Trade Commission against petitioners based on Sec. 5 of the Federal Trade Commission Act, 52 Stat. 111, 15 U.S.C.A. Sec. 45. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A., Sec. 347).

STATEMENT OF THE CASE.

The petitioners manufacture push cards and punch boards, selling and distributing them in interstate commerce to manufacturers of and dealers in, various other articles of merchandise. Some of the push cards and punchboards are so prepared that when used by persons others than petitioners in distributing merchandise to the consuming public they involve games of chance.

Many persons who sell and distribute candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles of merchandise in interstate commerce purchase Petitioners' push cards and punchboards, pack and assemble them together with merchandise and sell them to retail dealers. Other retail dealers purchase the cards and boards directly from Petitioners and make up their own assortments.

The retailers distribute the merchandise to the purchasing public by means of the push cards and punchboards.

The element of chance involved induces members of the purchasing public to deal with such retailers and this in turn induces retailers to deal with manufacturers and wholesalers who assemble their merchandise with the push cards and punchboards.

The respondents thus supply to, and place in the hands of persons, firms, and corporations the means of and instrumentalities for, engaging in unfair methods of competition in commerce and unfair acts and practices in commerce within intent and meaning of the Federal Trade Commission Act.

Petitioners' answer amounts to a general denial.

Statement of the Facts.

Petitioners manufacture punchboards, and push cards which they sell to other persons, firms and corporations. Some of petitioners' products are used to distribute merchandise. The only persons, firms or corporations who use punchboards as chance devices to distribute merchandise are persons, firms and corporations who are engaged exclusively in intrastate commerce.

The complaint does not allege that the intrastate use of punchboards to distribute merchandise is a violation of the F.T.C. Act nor is there an allegation that the shipping of punchboards which are used exclusively in intrastate commerce is a violation of the said statute.

The order is as follows, to wit:

It is ordered that the respondents do forthwith cease and desist from:

Selling or distributing in commerce as commerce is defined in the Federal Trade Commission Act, punch boards, push cards, or other lottery devices, which are to be used, or may be used, in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

SPECIFICATION OF ERRORS INTENDED TO BE ARGUED.

1.

The decision in this case is contrary to and in direct conflict with the court's decision in the cases of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, and the *Schechter Poultry Corporation* v. *U. S.*, 295 U. S. 495.

2.

The Commission's jurisdiction is limited to the preventing of the "use" of unfair methods of competition in commerce or unfair or deceptive acts or practices.

3.

This proceeding is not to the interest of the public as required by Sec. 5 of the Federal Trade Commission Act.

4.

The Federal Trade Commission Act, 52 Stat. 11, 15 U.S.C.A. Sec. 45 is unconstitutional.

SUMMARY OF ARGUMENT.

Our first point is that this Court in the *Bunte* Case held that the intrastate use of a chance device to distribute merchandise is not within the jurisdiction of the Commission, while on the other hand, the decision in the case at bar holds to the contrary, that such acts are within the jurisdiction of the Commission.

Our second point is that the Commission's authority is limited to the preventing of unfair methods, acts or practices used in the selling of merchandise; it does not have the authority to stop the selling of merchandise. Our points being that the order issued herein is not against the using of any unfair methods, acts or practices which are used to sell merchandise, but it is issued against the selling of merchandise.

Our third point is that because the Congress did not give the Commission authority to prevent the intrastate use of a chance device to distribute merchandise, a proceeding having for its purpose the prevention of such transactions is not to the interest of the public as required by the statute.

Our fourth point is that the statute is unconstitutional because it is a wrongful delegation of legislative power.

ARGUMENT.

Petitioners' first point is that the decision in the case at bar by the United States Circuit Court of Appeals is contrary to and in direct conflict with the court's holding, in the cases of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 and *Schechter Poultry Corporation* v. *U. S.*, 295 U. S. 495.

This Court in the *Bunte* case held that the *intrastate* use of a chance device to distribute merchandise is not within the purview of the Federal Trade Commission act, therefore, the Commission does not have jurisdiction over such transactions. The decision herein holds just the contrary, that the intrastate use of a chance device to distribute merchandise is within the purview of the said statute, therefore, the Commission has jurisdiction over such transactions.

The case of *Schechter* v. *U. S., supra,* held that the Congress does not have power to regulate the intrastate sale of merchandise. There is no finding of fact nor any contention made that the intrastate use of a chance device to distribute merchandise has any effect on interstate commerce, the fact is that it does not.

The Court of Appeals in its decision in this case relied upon two other circuit court cases, *Globe Cardboard Novelty Co.* v. *Federal Trade Commission,* 192 F.(2) 444; and *Charles A. Brewer and Sons* v. *Federal Trade Commission,* 158 F.(2) 74. Both of these cases either ignored the principle of law announced by this Court in the *Bunte* Case, *supra,* or just refused to follow it.

In the case of *Globe Card and Novelty Co.* v. *Federal Trade Commission,* 192 F. (2d) 444, the Third Circuit Court said:

> "Since the decision of the Supreme Court in *Federal Trade Comm.* v. *Keppel & Bro.,* 291 U.S. 304 (1934), it has been settled law that the sale of merchandise by lottery methods constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act."

This interpretation of the *Keppel* case is not only an erroneous interpretation of that case but the principle of law as stated by the Third Circuit is contrary to and in direct conflict with the holding in the *Bunte* Case. The *Bunte* Case held that the intrastate sale of merchandise by lottery methods does not constitute unfair methods of competition under Section 5 of the Federal Trade Commission Act.

At this point it is well to note that it is conceded that all sales of merchandise by lottery methods are exclusively intrastate transactions. On this point in this case the Ninth Circuit says:

> "The Commission's brief here admits concerning the place in which the gambling sales are consummated to the ultimate consumer that: 'It is true that the final sale to the ultimate purchaser by means of lottery of necessity, always occurs in intrastate commerce and is an intrastate transaction.'"

Bearing in mind that all sales of merchandise by lottery methods to the public are strictly intrastate transactions we return to a discussion of the above quotation from the *Globe* case. The *Keppel* case did not settle that the sale of merchandise to the public by lottery method constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act. The Su-

preme Court in that Case simply held that under the findings of the Federal Trade Commission the interstate shipments of "break and take" because of their adverse effect upon interstate competitors is an unfair method of competition within Section 5 of the Federal Trade Commission Act. The holding in that case is limited strictly to interstate transactions and the effect such acts had upon competitors in interstate commerce.

Some time after the *Keppel* case this Court in the case of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 held that the intrastate sale and distribution of merchandise by lottery methods did not constitute unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act, therefore, when the Third Circuit Court of Appeals ruled that the *Keppel* case held that such transactions were a violation of the Federal Trade Commission Act it ignored the holding in the *Bunte* case and in reality overruled this Court.

The situation is that this Court has held that the intrastate use of a chance device in the distribution of merchandise is not a violation of the Federal Trade Commission Act and that contrary to and in direct conflict with this holding the decision by the Circuit Court of Appeals herein holds that such use is a violation of said statute. Under such a situation it seems that this Court should not hesitate to issue a writ of certiorari.

The Supplying to or Placing in the Hands of Others Chance Devices for Engaging in Unfair Methods of Competition and Unfair Acts and Practices Within the Intent and Meaning of the Federal Trade Commission Act Is Not Within the Purview of Said Act.

This is the question of federal law which has not been, but should be settled by this Court.

The basic allegation of the complaint is alleged as follows, to wit:

> "The respondents thus supply to, and place in the hands of, said person, firms and corporations the means of, and instrumentalities for, engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act." (R. 8)

The order issued herein is as follows, to wit:

> "It is ordered that the respondents, Leo Lichtenstein, Libbie Lichtenstein, and Byron J. Lichtenstein do forthwith cease and desist from:
>
> "Selling or distributing in commerce, as 'commerce' is defined in the Federal Trade Commission Act, punch boards, push cards, or other lottery devices, which are to be used, or may be used, in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme." (R. 44)

It is conceded by the Commission and in the opinion of the Circuit Court that the petitioners ship just chance devices in interstate commerce to people who use them exclusively in intrastate commerce, that is, the petitioners ship a chance device, a punch board, to a local tavern or pool hall, or similar places, where they are used to distribute merchandise which merchandise the users of said devices have purchased not from petitioners but from some other source.

There is no contention made by the Commission nor does the Circuit Court in its decision contend that the complained of acts of the petitioners are in any way, directly or indirectly, harmful or unfair to their competitors or that said acts are deceptive or unfair to petitioners' customers, to consumers, or to anybody else.

The sole ground upon which the decision is based is that petitioners place in the hands of others a chance device which is used in connection with the violation of the Federal Trade Commission Act.

As the order restrains the petitioners from shipping their chance devices to people who use them exclusively in intrastate transactions, the decision in this case is based upon the principle of law that the intrastate use of a chance device is a violation of the Federal Trade Commission Act. As stated above, this holding by the Circuit Court of Appeals is contrary to and in direct conflict with this Court's decision in the cases of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 and *Schechter Poultry Corporation* v. *U. S.*, 295 U. S. 495.

What we wish to do here is to make two points. The first one is that this principle of law that we are discussing under this heading has no application to the case at bar, because most of petitioners' customers use the boards exclusively in intrastate commerce and under the Bunte decision these people do not violate the Federal Trade Commission Act. This makes it self evident that when petitioners furnish a chance device to a person who uses it strictly in intrastate commerce the petitioners are not supplying to or placing in the hands of these people the means of, and instrumentalities for engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act. Just to make our position clear let us say that these people to whom the devices are furnished under these circumstances, as held by this Court in the *Bunte* case, do not use the boards to engage in unfair methods of competition or unfair acts or practices within the intent and meaning of the Federal Trade Commission Act.

The second point we wish to make here is that as the Federal Trade Commission Act provides that the Commission can prevent only the *"using"* of unfair method of competition, and unfair or deceptive acts and practices the Commission under the rule of strict construction as set out in the above cases does not have jurisdiction over the doing or committing of acts as distinguished from the *using* of acts. The Commission has no jurisdiction over the doing of an act such as just the act of selling an article of merchandise; its jurisdiction is limited to the *using* of some trade method, act, or practice to make the sale. On this point the statute provides: (Sec. 5 of the Federal Trade Commission Act, 52 Stat. 111, 15 U.S.C.A. Sec. 45.)

> "(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is *using* any unfair method of competition or unfair or deceptive act or practice in commerce, * * * it shall issue * * * complaint * * *." (Emphasis provided)

What we wish to make clear is that Congress advisedly and intentionally used only the word "using" so that the Commission's authority would be limited to methods, acts, and practices which are resorted to for the sole purpose of selling goods. In other words it is the method of selling which the Commission has power to prevent not the mere selling of a commodity. Congress never intended to give the Commission authority to stop the mere selling of a commodity even though the commodity might be one which it would be to the benefit of the public to have off the market. In other words the Commission does not have jurisdiction to prohibit the selling of a commodity because of some inherent quality of the merchandise which makes it undesirable from the

standpoint of the morals of the public. The sole purpose of the act is to protect competitors and consumers, as we said above, not from the commodity itself but only from the methods, acts, or practices which are employed in the selling of the commodity. If the Commission's authority is not limited as we have indicated herein, to the preventing of the use of, methods, acts and practices, but is enlarged to include the power to prevent the mere selling of articles of merchandise which merchandise may seem to the Commission should be taken off the market the Commission's authority will go far beyond the limits that Congress intended it should be confined within.

On the question of the construction of the F. T. C. Act, this Court through Justice Frankfurter had this to say in the *Bunte* case *supra*:

> "While one may not end with the words of a disputed statute, one certainly begins there."

and this to say in the case of *F. T. C.* v. *Raladam Co.*, 283 U. S. 643:

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

and this to say in the case of *F. T. C.* v. *Klesner*, 280 U. S. 19:

> "* * * the scope of its (the Commission) authority is strictly limited."

These cases certainly establish beyond doubt that the F. T. C. Act must be subjected to the strictest construction.

We wish to emphasize what Justice Frankfurter said in the *Bunte* case; "While one may not end with the words of a disputed statute, *one certainly begins there.*" (Emphasis provided)

As the jurisdiction of the Commission is limited by the wording of the statute creating it, to the preventing of the "using" of unfair methods of competition and unfair acts and practices the word "using" as used in the statute can not be, as was done by the Circuit Court herein, construed to give the Commission jurisdiction over the aiding, abetting, procuring, and inducing of such acts or the supplying to and placing in the hands of others the means of, and instrumentalities for, engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act. Such an interpretation of the statute by the Circuit Court of Appeals is clearly contrary to the rule of strict construction as laid down by this Court in the three cases cited above.

As this Court in the *Bunte* case, *supra,* settled beyond question, that the word "in" was used in the said statute cannot be interpreted to include or mean "affecting", the word "using" as used in the statute cannot be interpreted to mean aiding, abetting, procuring and inducing or the supplying to or placing in the hands of others.

From what has been said above on this point we feel that it is self evident that the Commission does not have jurisdiction of the selling or furnishing a chance device to other people even though the other party is going to use the said device in connection with the distribution of merchandise in such a way as to violate the Federal Trade Commission Act.

This Proceeding Is Not to the Interest of the Public As Required by Section 5 of the Federal Trade Commission Act.

On this point the statute provides as follows, to wit:

> "(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, *and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public,* it shall issue * * * complaint * * *." (Emphasis provided)

Discussing this phrase of the statute this Court in the case of *Federal Trade Commission* v. *Raladam,* 283 U. S. 643, held unequivocally that the provision of the statute requiring that proceedings by the Commission must be to the interest of the public is not a part of the substantive protection provided by the act, but is a limitation on the protective power and jurisdiction granted. The Court, page 648, says:

> "By these additional words, (*and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public,*) protection to the public interest is made of paramount importance but, nevertheless, they are not substantive words of protection, but complimentary words of limitation beyond the jurisdiction conferred by the language immediately preceding."

From this statement it is clear that the only concern the public interest has to do with the jurisdiction of the Federal Trade Commission is the interest the public has in the elimination of the practice of using the unfair method, act, or practice in the selling of a commodity, that is the elimination of the using of said method, act, or practice

must be to the interest of public as distinguished from just a private interest. Congress certainly did not intend to provide that it would be to the interest of the public for the Federal Trade Commission to proceed against a method, act, or practice even though it is unfair, which act, method, or practice is not within the purview of the Federal Trade Commission Act. In other words if the Congress did not give the commission jurisdiction over a certain method, act, or practice a proceeding against such method, act, or practice cannot be said to be in the interest of the public.

The Circuit Court in this case said on this point:

> "Petitioner further urges that the prevention of the use of its gambling devices in the sale of merchandise to the ultimate consumer is not in the public interest. We find no merit in this contention."

This statement by the Court makes it clear that the holding of the Court is that the interest the public has in a proceeding to prevent the intrastate use of gambling devices in the sale of merchandise to the ultimate consumer is sufficient to satisfy the provision in the statute on this point. As we have shown herein above that this Court in the *Bunte* case held that such transactions are not within the jurisdiction of the Federal Trade Commission, a proceeding to prevent these acts is not in the public interest as required by the statute. In other words we construe the *Bunte* decision in holding that the intrastate use of gambling devices in the sale of merchandise is not within the purview of the Federal Trade Commission Act, that a proceeding to prevent such transactions would not be to the interest of the public as required by the said statute. Therefore when the Ninth Circuit Court held that such a proceeding was to the interest of the

public as required by the said statute its holding is contrary to and in direct conflict with the holding on this point in the *Bunte* case.

The Federal Trade Commission Act, 52 Stat. 111, 15 U.S.C.A. Section 45, Is Unconstitutional.

Under this statute before its amendment the order of the Commission was never operative; before any order had any effect, the proceedings by the Commission had to be reviewed by a circuit court of appeals and when this was done it was not the Commission's order that became operative but the court issued it's own order which became the only operative order. Since the amendment this is not the situation. Now it is the order of the Commission which is enforced, not an order of a court. Under the statute now if the proceedings of the Commission is not taken before a court within 60 days after it is rendered the order becomes final and can be enforced; if it is taken before a court the court on review only affirms the Commission's order and the Court merely orders that the order of the Commission be obeyed.

Therefore, since the amendment the Commission's order is legislative being a rule of conduct. Such a situation is identical with a statute which provides that only Mr. A cannot do a certain act leaving the commission of the same act free from penalty enforcement when done by all other people. Such a condition is clearly in conflict with the equal protection clause of the constitution. It might be contended that the same situation was present under the act before its amendment but this is not correct. Before the amendment it was an order of a court enforced by contempt proceedings; the only one that had power to enforce the order was the court that issued it.

Whereas, now the Federal Trade Commission order is made the basis of an action at law by the United States Government to collect a penalty, which action is prosecuted in any federal district court. This difference is sufficient to make the statute come within the condemnation of the equal protection clause of the constitution.

CONCLUSION.

Wherefore, petitioners respectfully request that this Court grant their petition, require by certiorari that the cause be certified to It for review and determination, issue Its writ of certiorari to review the judgment of said Circuit Court of Appeals, hear, consider, and determine the questions presented and reverse the judgment, and order of said Court insofar as that judgment, and the holdings of the Court, are adverse to the petitioners' contentions.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 83

LEO LICHTENSTEIN, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 162) is reported in 194 F. 2d 607.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1952, and a timely petition for rehearing was denied on February 27, 1952 (R. 172-174). The petition for a writ of certiorari was filed on May 26, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

The principal question presented is whether interstate sales of punch boards and other lottery devices which are to be used by the ultimate purchasers in selling merchandise to the general public by means of games of chance and other lottery schemes constitute unfair acts or practices in interstate commerce within the meaning of Section 5 of the Federal Trade Commission Act.

Other questions which are presented are whether a proceeding against such practices is "to the interest of the public" and whether Section 5 of the Federal Trade Commission Act is constitutional.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and

> if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect * * *.

STATEMENT

This is a proceeding under Section 5 of the Federal Trade Commission Act. The findings of the Federal Trade Commission are not disputed. The findings which are presently material may be summarized as follows:

Petitioners are co-partners who have been engaged for a number of years in the manufacture and sale in interstate commerce of punch boards and push cards designed for use by retail dealers in selling merchandise to the general public by means of a game of chance. The boards and cards all involve the same general principle. A person wishing to "play" the board pays a specified sum for the privilege of punching the board and removing from it a slip of paper. If the paper so obtained bears a winning number, the purchaser receives without additional cost a designated article of merchandise; if his paper does not carry a winning number, he gets nothing or, in some cases, merchandise of much less value. (R. 34-35.)

Many of petitioners' boards and cards carry pictures and descriptions of the articles of merchandise, such as candy, cigarettes, cigarette lighters, etc., awarded as prizes to those who draw lucky

numbers. Other boards and cards have blank spaces in which the purchaser of the device may insert his own instructions and statement as to the merchandise awarded as prizes, and some of the boards have a hole or depression in which a sample of the merchandise offered by the dealer may be exhibited. Many of the boards and cards are made to order to meet the requirements of particular purchasers. (R. 36.)

Manufacturers, jobbers and wholesalers of various articles of merchandise purchase petitioners' boards and cards and make up assortments consisting of the board or card and certain merchandise (R. 37). They sell the merchandise so packed and assembled to retailers for resale to the public (*ibid.*). Petitioners thus furnish to others the means for selling merchandise through the medium of games of chance (R. 40).

Because of the element of chance involved, members of the purchasing public have been induced to trade or deal with retailers employing petitioners' boards or cards, and many retailers have been induced to purchase from manufacturers, jobbers and wholesalers who sell their products together with these boards or cards (R. 40). Trade is thereby frequently diverted from manufacturers, jobbers and wholesalers who do not use lottery devices in promoting sale of their merchandise (R. 41). Sale of goods through the use of petitioners' boards and cards encourages gambling, "to the prejudice of the public," and is contrary to established public policy (*ibid.*).

The Commission concluded that the acts and practices of the petitioners, as set forth in its findings, constitute unfair methods of competition and unfair acts and practices in interstate commerce within the meaning of the Federal Trade Commission Act (R. 41-42). The order entered by the Commission directed petitioners to cease and desist from selling in interstate commerce punch boards, push cards or other lottery devices which "are to be used" in the sale or distribution of merchandise to the public by means of "a game of chance, gift enterprise, or lottery scheme" (R. 44). The court of appeals unanimously upheld the validity of this prohibition (R. 162-174).

ARGUMENT

I

We submit that this case is governed in every essential respect by *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U.S. 304 (1934). That case upheld the validity of a Commission order directed against interstate sales of "break and take" candy, arranged so that the purchaser of an individual piece in a retail store might, depending upon chance, get his money back or a "prize," or pay a higher or lower price for his purchase. This Court said that it could see no essential difference under the statute between employing the element of chance as a sales appeal and employing an element of deception through misleading labeling; that devices whereby the return for one's money is dependent upon chance have "met with

condemnation throughout the community" and have long been deemed "contrary to public policy"; and that to hold them not to be "unfair" within the meaning of the Act would be "a gross perversion of the normal meaning of the word." 291 U.S. at 313.

Orders of the Commission directed against interstate distribution of goods or products designed to promote sale at retail to consumers by appeal to the gambling instinct have been repeatedly before the various court of appeals. These orders have been universally sustained; indeed, certiorari has already been denied eight times in such cases.[1]

Prior to 1938, the statute prohibited "unfair methods of competition." To establish a violation, there had to be a showing that the unfair

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[1] *Hofeller* v. *Federal Trade Commission*, 82 F. 2d 647 (C.A. 7), certiorari denied, 299 U.S. 557; *Federal Trade Commission* v. *A. McLean & Son*, 84 F. 2d 910 (C.A. 7), certiorari denied, 299 U.S. 590; *Federal Trade Commission* v. *F. A. Martoccio Co.*, 87 F. 2d 561 (C.A. 8), certiorari denied, 301 U.S. 691; *Chicago Silk Co.* v. *Federal Trade Commission*, 90 F. 2d 689 (C.A. 7), certiorari denied, 302 U.S. 753; *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999 (C.A. 7), certiorari denied, 308 U.S. 610; *Ostler Candy Co.* v. *Federal Trade Commission*, 106 F. 2d 962 (C.A. 10), certiorari denied, 309 U.S. 675; *Koolish* v. *Federal Trade Commission*, 129 F. 2d 64 (C.A. 7), certiorari denied, 317 U.S. 683; *Jaffe* v. *Federal Trade Commission*, 139 F. 2d 112 (C.A. 7), certiorari denied, 321 U.S. 791; *Johnson Candy Co.* v. *Federal Trade Commission*, 78 F. 2d 717 (C.A. 7); *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. 2d 718 (C.A. 9); *Minter* v. *Federal Trade Commission*, 102 F. 2d 69 (C.A. 3); *Hill* v. *Federal Trade Commission*, 124 F. 2d 104 (C.A. 5); *Kritzik* v. *Federal Trade Commission*, 125 F. 2d 351 (C.A. 7); *Lee Boyer's Candy* v. *Federal Trade Commission*, 128 F. 2d 261 (C.A. 9); *Wolf* v. *Federal Trade Commission*, 135 F. 2d 564 (C.A. 7); *Loughran* v. *Federal Trade Commission*, 143 F. 2d 431 (C.A. 8); and cases cited in note 2, *infra*, p. 9.

methods were injurious to competitors although a showing of specific losses to particular competitors was not required. *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643; *Federal Trade Commission* v. *Raladam Co.*, 316 U.S. 149, 152. Under the prohibition of "unfair or deceptive acts or practices," added to Section 5 by the Wheeler-Lea Act (52 Stat. 111) in 1938, the Commission is authorized to stop practices "unfair or deceptive to the public generally, * * * regardless of their effect upon competitors." S. Rep. No. 221, 75th Cong., 1st Sess., p. 2. The "unfair" acts and practices thus prohibited are at least as broad in scope as the "unfair" methods of competition with which the original Act dealt. In the instant case, therefore, it is immaterial whether or not petitioners' practices are injurious to their competitors. It is enough that they are "unfair" to the general consuming public, in the sense that they involve practies of a kind condemned both by law and the mores of the community.

Petitioners' basic contention (Pet. 11-18) seems to be that their conduct was deemed unfair only because their boards and cards were used to promote sale of goods on a gambling basis; that such sales are wholly intrastate; and that therefore they engaged in no unfair act or practice "in" interstate commerce and did not violate the Act. But when, as here, devices for effecting sales to the consuming public by "unfair" means are sold and distributed in interstate commerce, there plainly is an unfair act in interstate commerce. In *Keppel*

the unfair aspect of the respondent's conduct consisted in providing retailers with means for selling in intrastate commerce through appeal to the gambling instinct, but the unfairness was held to attach to the prior interstate movement of the goods. In so far as the relationship to commerce is concerned the situation here is the same.

The early case of *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, seems dispositive of petitioners' contention. In that case a manufacturer used labels which tended to deceive a substantial part of the consuming public, but not the dealers to whom the manufacturer sold. The deception which caused the manufacturer's conduct to be "unfair" therefore occurred only in intrastate sales, but the Act was held to be violated. This Court said (p. 494):

> The honest manufacturer's business may suffer * * * through the competitor's *putting into the hands of the retailer an unlawful instrument*, * * *. That *a person is a wrongdoer who so furnishes another with the means of consummating a fraud* has long been a part of the law of unfair competition. [Italics supplied.]

In the *Keppel* case the respondent used gambling devices to promote sale of its own product to consumers, and it furnished all the means for selling by means of a game of chance. Here, petitioners supply to others devices for so selling and the devices are used to promote sale of the goods of those who purchase the devices. Petitioners

thus aid and abet conduct of a kind prohibited by the Act. It lies within the power of the Commission to find that such aiding and abetting is an unfair act or practice within the ban of Section 5 of the Act. See *Keppel* case, *supra,* at p. 314. The courts of appeals for the Second, Third, Sixth, Seventh, and District of Columbia Circuits have so applied the Act, without a single dissenting vote.[2] In the *Brewer, Globe Cardboard* and *Hamilton* cases the practices involved were precisely the same as those here, namely, supplying gambling devices to others for use by them in selling their products to ultimate consumers. Furthermore, as the court below noted (R. 168-169), Congress has indirectly placed its stamp of approval on the *Brewer* case. When Congress recently outlawed certain interstate shipments of gambling devices (Act of January 2, 1951, 64 Stat. 1134, 15 U.S.C., Supp. IV, 1171 *et seq.*), it took pains to preserve the authority of the Federal Trade Commission as exercised and upheld in the *Keppel* case and in the *Brewer* case.[3]

Petitioners rely upon *Federal Trade Commis-*

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[2] *Modernistic Candies, Inc.* v. *Federal Trade Commission,* 145 F. 2d 454, 455 (C.A. 7); *Deer* v. *Federal Trade Commission,* 152 F. 2d 65, 66 (C.A. 2); *Charles A. Brewer & Son* v. *Federal Trade Commission,* 158 F. 2d 74, 77-79 (C.A. 6); *Globe Cardboard Novelty Co.* v. *Federal Trade Commission,* 192 F. 2d 444, 446-447 (C.A. 3); *Hamilton Mfg. Co.* v. *Federal Trade Commission,* 194 F. 2d 346 (C.A.D.C.). While the opinion in the *Hamilton* case discusses only the scope of the Commission's order, issues similar to those in the other cases were presented to the court by petitioner's statement of points and the briefs of the parties.

[3] See S. Rep. No. 1482, 81st Cong., 2d Sess., p. 4; H. Rep. No. 2769, 81st Cong., 2d Sess., pp. 9-10.

sion v. *Bunte Bros., Inc.*, 312 U.S. 349, which involved an order under Section 5 directed against a concern which sold only in intrastate commerce. The holding there that Section 5 is limited to practices employed "in" interstate commerce and does not extend to practices which merely affect such commerce has no application here. Petitioners sold their punch boards and push cards in interstate commerce, so that there is clear jurisdictional basis for the proceeding against them.

II

Although petitioners urge (Pet. 19-21) that the proceeding herein is not "to the interest of the public," the supporting argument is merely a renewal of the substantive contention, based on petitioners' interpretation of the *Bunte* case, *supra*, that petitioners' practices are not within the scope of Section 5 of the Act.

Petitioners also raise a question of constitutionality (Pet. 21-22), but without citation of authority or any showing that the question which is raised has substance. We deem it sufficient to refer to prior unsuccessful constitutional attacks based on the procedural changes in Section 5 made in 1938 by the Wheeler-Lea Act. See *Piuma* v. *United States*, 126 F. 2d 601 (C.A. 9), certiorari denied, 317 U.S. 637; *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999 (C.A. 7), certiorari denied, 308 U.S. 610.

CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1952.

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